

**MINUTES OF THE
GREENSBORO BOARD OF ADJUSTMENT
JUNE 28, 2010**

A meeting of the Greensboro Board of Adjustment was held on Monday, June 28, 2010 at 5:30 p.m. in the City Council Chamber of the Melvin Municipal Office Building. Board members present were: Rick Pinto, Chair, Clinton Turner, Cheryl Huffman, Bill Strickland, Scott Brewington, and Russ Parmele. Staff present were: Rawls Howard, Zoning Administrator, Loray Averett, Zoning Services Coordinator, Dick Hails, Planning Director, as well as Jim Clark, City Attorney's Office.

Chair Pinto called the meeting to order and explained the policies and procedures of the Board of Adjustment. He further explained the manner in which the Board conducts its hearings and the method of appealing any ruling made by the Board. The Chair advised that each side, regardless of the number of speakers, would be allowed a total of 20 minutes to present evidence.

Chair Pinto decided to hear item BOA-10-18 first due to time issues related to the other cases.

APPROVAL OF MINUTES

Ms. Huffman moved to approve the minutes of the May 24, 2010 meeting, seconded by Mr. Turner. The Board voted 6-0 in favor of the motion. **(APPROVED)**

SWEARING IN OF STAFF

Rawls Howard, Loray Averett, and Dick Hails were sworn in for their testimony related to matters listed on the agenda.

NEW BUSINESS

2) SPECIAL EXCEPTION

- (a) **BOA-10-16: 805-3E GRENTTON PLACE** Presidia Real Estate Group, LLC, through Applicant Eleanya Agidi, requests a Special Exception as authorized by Section 30-5-2.37(B) to allow separation encroachments to the current development standards.

Special Exception Request #1: The proposed family care home will be 1,757 feet from one family care home (6 or less persons) to another family care home, located at 1515 Dodson Street, (6 or less persons) when 2,640 feet is required. **(DENIED)**

Special Exception #2: The family care home will also be 1.693 feet from one family care home (6 or less persons) to another family care home, located at 6005 White Chapel way, (6 or less persons) when 2,640 feet is required. **(DENIED)**
Present Zoning – CD - RM-18, Block Sheet – 177, Cross Street – Yanceyville Street.

Rawls Howard stated the proposal is to locate a family care home which is too close to existing family care homes. The request is two fold: Special Exception Request #1: The proposed family care home will be 1,757 feet from one family care home (6 or less persons) to another family care home, located at 1515 Dodson Street, (6 or less persons) when 2,640 feet is required. Special Exception #2: The family care home will also be 1.693 feet from one family care home (6 or less persons) to another family care home, located at 6005 White Chapel way, (6 or less persons) when 2,640 feet is required. He reminded the Board that last month the

City Council ruled that the spacing requirement increased from a ¼ mile to a ½ mile. The lot is located on the western side of Yanceyville St. east of Lees Chapel Rd. on Zoning Map Block Sheet 177. It is currently zoned CD-RM-18. The applicant is proposing to locate a family care home with 9 or less persons at this address. Privilege License records reflect that both of the existing family care homes are in operation, and all required

renewals and licenses are in compliance with the City of Greensboro. The proposal is for the North side of Lees Chapel Rd. and the existing homes are on the south side of Lees Chapel Rd. Lees Chapel Rd. is classified as a major thoroughfare. The existing land use is a multifamily dwelling unit, and all of the adjacent zoning is RS-12 except to the west it has an RM-12 zoning designation.

Chair Pinto asked if there was anyone present wishing to speak in favor of the item. The speakers were sworn in.

Eleanya Agidi, 805-3F Grentton Pl., stated that he lived next door to this proposed family care home. He moved to the new apartment to relocate his group home which had existed at 2230 N. Elm St., but there was a court order to sell the home and they were forced to move. By the time they moved on the first of May, the rule had changed to ½ mile. He submitted the lease which was signed on May 1st, 2010.

Chair Pinto asked Mr. Agidi about the area and the roads that divide the existing group homes from the proposed site. Mr. Agidi stated that the area is a newly developed area. Lees Chapel Rd. is a major road of five lanes, and it is at times very busy. Yanceyville St. and Yanceyville Rd. are also very busy multilane roads. The development is an apartment complex. The proposed unit is a three bedroom apartment he wishes to use for three clients.

Mr. Brewington asked how far the walking distance would be between the proposed family care home and the existing family care homes. Mr. Agidi stated that the distance is a walkable distance, but it is not in walking distance.

Mr. Parmele asked how many units were in the building. Mr. Agidi stated there were a total of four units in the building, he rents one as his residence and one for the group home. Mr. Parmele asked if there was any regulation about having a group home in a single family residence. Mr. Howard stated there is no regulation that requires the home to be located in single family buildings, and the landlord has given permission to allow this use.

Chair Pinto asked if the special exception would run with the property owner. Mr. Howard stated that the exception runs with the applicant for the exception. That could be either the land owner, the operator, or in some cases they are the same. Ms. Averett stated that in multifamily zoning districts, family care homes are permitted to have 9 or less persons.

Mr. Strickland asked if there were any conditions in the zoning of the property that would prohibit this use. Ms. Averett stated that there were not.

Ms. Huffman asked why the applicant waited before coming to the Board if the lease was signed on May 1st. Mr. Agidi stated that he needed to get his Privilege License renewed first. It was only after he went to renew the license that he was informed of the separation change. He stated his license was current for the previous address, but needed to get it renewed after the move to the current address.

No one spoke in opposition to the item. Chair Pinto closed the public hearing and opened Board discussion.

Chair Pinto stated that this was seen last month as the rule was in the process of changing.

Ms. Huffman stated that she understands the separation changes being an issue, but she is more concerned about the proximity of the two other family care homes and the number of multi-dwelling units that surround the request.

Mr. Brewington stated there were no major barriers between the existing and proposed sites. The roads are major thoroughfares, and the practical distance is substantial, but the timing is unfortunate. Mr. Parmele stated that the rule change by Council was to avoid clustering, and this request would not avoid clustering.

After some discussion, Mr. Parmele moved to uphold the zoning enforcement officer for Special Exception Request #1, and the variance denied based on the following: The variance is not in harmony with the general purpose and intent of the ordinance. It does not preserve its spirit because the proposed location of the family care home is 1,757 feet when from another family care home when 2,640 feet is required. The granting of the variance does not ensure the public safety and does not do substantial justice because of the close proximity of the existing family care home and the concern about clustering. Seconded by Mr. Strickland. The Board voted 4-2 in favor of the motion. (Ayes: Parmele, Strickland, Turner, Huffman. Nays: Pinto, Brewington.)

Mr. Parmele move to uphold the zoning enforcement officer for Special Exception Request #2, and the variance denied based on the following: The variance is not in harmony with the general purpose and intent of the ordinance. It does not preserve its spirit because the proposed location of the family care home is 1,693 feet when from another family care home when 2,640 feet is required. The granting of the variance does not ensure the public safety and does not do substantial justice because of the close proximity of the existing family care home and the concern about clustering. Seconded by Mr. Strickland. The Board voted 4-2 in favor of the motion. (Ayes: Parmele, Strickland, Turner, Huffman. Nays: Pinto, Brewington.)

OLD BUSINESS

1) APPEAL OF NOTICE OF VIOLATION

- (a) **BOA-10-03: 2511 FONTAINE ROAD** Oxford House, Inc. appeals a Notice of Violation In reference to the use of the property for more than four (4) unrelated individuals living together. This case was continued from the February 22, 2010 and the May 24, 2010 meetings. Section 30-2-2-7, Present Zoning – RS-9, BU-72, Cross Street - Cheltenham Boulevard. **(DENIED)**

Rawls Howard stated that the applicant, through his attorney, Greg Heafner, has filed an appeal of a Notice of Violation in reference to the use of the property for more than 4 unrelated individuals living together. This case was continued from the February 22, 2010 and May 24, 2010 meetings. The zoning office received a complaint on December 9, 2009 that there is a family care located at the referenced address and that the home location did not meet the ¼ mile spacing requirement. Enforcement staff conducted an inspection and found multiple people living in the house. The residents told the officer they were a half-way house. The field officer issued a Notice of Violation in reference to Section 30-5-2.37 for a family care home which did not meet the spacing requirement. On or around December 28, 2009, the zoning office received a letter from the applicant's attorney that references the use of the property, related issues, and Oxford House guidelines information. After discussion with the staff, it was determined that they did not meet the City's definition of a family care home as the house had no administrative or supervisory personnel. The attorney informed staff that there were 8 or more unrelated persons living in the house. Staff then informed the attorney that despite not being a family care home, they were, in fact, in violation of the City's definition of a family by having that many unrelated people in a structure in a residential district. As such, they would be issued a Notice of Violation for this infraction and the previous one would be rescinded. On January 5, 2010, the City issued a revised Notice of Violation in reference to Section 30-2-2.7 which references the definition of family. On or around Jan 14, 2010, the City Attorney's Office received a letter from the applicant's attorney which acknowledged the Notice of Violation, along with his concerns over how the City was applying its family definition, and requests for intent due processes. On January 20, 2010, the applicant's attorney filed their appeal of the January 5, 2010 Notice of Violation. On February 22, 2010, the case was continued to the May 24, 2010 meeting. On May 24, 2010, the case was continued to the June 28, 2010 meeting. The continuance was granted in order to give the applicant an opportunity to have his text amendment heard and ruled upon at the June 15, 2010 City Council meeting. On June 15, 2010 City Council denied the applicant's request concerning his text amendment. The RS-9, Residential Single-Family District is primarily intended to accommodate moderate to high density single-family detached dwellings in developments where public water and sewer services is required. The overall gross density in RS-9 will typically be 4.0 units per acre or less.

Chair Pinto asked if there was anyone present wishing to speak in favor of this matter. The speakers were sworn in.

Greg Heafner, 1510 Twisted Oak Dr., Chapel Hill, NC, presented a number of items to the Board including: a request for a written decision on the item, a copy of the Oxford House Manual, a list of Oxford Houses currently in existence in Greensboro, a written report from Dr. Leonard Jason, DePaul University, and the letters sent to staff over the course of this matter. He stated that he came before the Board in February on the same appeal, the Board expressed the opinion they would be unable to grant the relief he sought, and it was suggested to him that he explore alternate means of relief. He sought a text amendment, the Planning Board declined to endorse the text amendment, and the City Council voted against the text amendment. Other than the City's own opposition, there has been no public opposition.

Mr. Heafner stated that he seeks reasonable accommodation for this group of people under the federal Fair Housing Act. Oxford House has a need for that accommodation because it cannot operate with any less than six persons. The written report from Dr. Jason explains why. The Oxford House Manual explains that the houses cannot have less than six under their own guidelines. There is a federal statute that funds Oxford House, which also states that the Oxford House model-type home cannot have less than six people to get any funding. There is no way that Oxford House could operate any of these 17 homes with less than six people. All of the Oxford House homes listed show an average of 7 or 8. Houses operate with a vacancy or two at a time. It is common for a house to operate with a few as five people. Due to these reasons they cannot operate with a maximum of four persons. There is also a therapeutic need. The City has agreed that the Oxford House model is not a family care home or a group care home. He argued that they are a family, so there is an exception needed to the limit of four. Without that accommodation an Oxford House cannot exist in this city. Council denied the text change that was catered to allow only Oxford House to operate this type of arrangement. If the accommodation is not made at this hearing, then it would be his understanding that an Oxford House cannot exist.

Chair Pinto asked if it was Mr. Heafner's position that if the request is denied, in essence all 17 homes would be in violation. Mr. Heafner stated he felt they would be under the possibility of notices of violation. If not he would ask what is different about the others. Chair Pinto stated the difference is that someone made a complaint about the Fontaine Rd. address, and the department is complaint driven. Mr. Heafner stated that he did not like the term 'complaint', because after review the Town initiated the meeting. But there have not been any complaints like there are too many cars, or the people are doing something wrong, or the police are coming. Over the 17 years that Oxford Houses have been operating in Greensboro, he is not aware of any complaint until this one.

Mr. Heafner stated that there is an unopposed and unquestioned need, from a therapeutic, financial, and practical stand point, for the reasonable accommodation being asked for. The second aspect of the federal statute is to show there is not an undue burden on the City. He would contend that the record demonstrates that with the 16 or 17 Oxford Houses over at least the last ten years with no complaint until now show there is not an undue burden. Therefore he believes it is right for an accommodation.

Chair Pinto asked why the City's ordinance of allowing 4 unrelated persons to live together in a single family residence would not be an accommodation. Mr. Heafner stated that the group living in the homes are recovering alcoholics, and as such are a protected class of people. The accommodation required is case specific, and in this case a reasonable accommodation would be 8 persons. He believes the ordinance, as written, is not an accommodation at all because it does not mention its purpose.

Dick Hails asked if Mr. Heafner was aware that the living arrangement at 2511 Fontaine Rd. fits the ordinance's definition for a rooming house, which is permitted in a number of zoning districts in the City, just not in a single family zoning district. Mr. Heafner stated that he was not aware of that, but single family living situations are a key component to the Oxford House program.

Mr. Brewington left the meeting at 6:42, as an unexcused absence.

Ms. Huffman asked what the limit on the homes would be. Based on previous information, Ms. Gibson-Meyers gave an estimated average of 10-12 per home, and the manual does not list a limit at all. Mr. Heafner stated that Ms. Gibson-Meyers is a national worker, and the average is likely from nationwide Oxford Houses. In

North Carolina, or Greensboro, it is lower. The list of homes in Greensboro shows around 7 or 8. He believes they would agree to a limit. Ms. Huffman asked if single family homes was a key to the program, why were at least two of the Oxford Houses listed in apartments. Mr. Heafner stated that each house is autonomous, but approved by state Oxford House employees. The employees must have investigated the apartments for use and deemed them appropriate.

No one spoke in opposition to the matter.

Chair Pinto asked Mr. Clark to explain his thoughts on the Board's authority related to this matter. Mr. Clark stated that in his opinion the Board should take a narrow view of their authority and stay as close to their direct authority as given through ordinance. The Board, under N.C.G.S. 160A-388, has the authority to hear and decide appeals made by an administrative official, and it may reverse or affirm, wholly or partly, or may modify the order and shall make any determination that in its opinion ought to be made in the premises. Mr. Clark stated that in his opinion 'in the premises' is dealing with just the determination as to the enforcement of this ordinance. If the Board goes more broadly it would probably begin to encroach into areas that are more legislative in nature. It is clear under the Fair Housing Act that cities do have the obligation to grant a reasonable accommodation where it is proper, but the determination of that is probably best left at the City Council level.

The public hearing was closed and the matter was opened to Board discussion.

Mr. Turner cited the Oxford House Manual and stated that the manual calls for the house to be occupied for their purposes only if it does not violate local zoning or health and safety laws.

Ms. Huffman stated that the manual has certain requirements or preferences, but in action the Oxford Houses are contradicting themselves. To ask this Board for clarification on this issue is a concern. Also, this type of living arrangement is allowed in other zoning districts.

Chair Pinto stated that the basic issue is to decide if the zoning enforcement officer 1) correctly read the definition of family and applied it in this situation, and 2) whether that officer should take into consideration if the decision was reasonable based on the protected class and the federal law. That is asking this Board for an interpretation and decision it might not have the authority to do. As the ordinance is written the zoning enforcement officer is applying it appropriately, Oxford Houses can operate in Greensboro so, an accommodation has been made, and he is inclined to deny.

Mr. Strickland agreed with what was stated, and feels he has not been convinced that the Board should grant the appeal.

Chair Pinto wanted the record to reflect that the Board considered the accommodations that the City could have given, and believes that the City has in place provisions to accommodate use by Oxford House including other zoning districts.

Chair Pinto moved in case BOA-10-03, the Appeal of Notice of Violation for 2511 Fontaine Road, in reference to the use of property for more than four unrelated individuals living together, that the Board reject the appeal and uphold the zoning enforcement officer's Notice of Violation, and in support stated the zoning enforcement officer correctly read the ordinance, Oxford House does have more than four unrelated individuals living together, and that the Board, after considering all evidence including that of the appellant that reasonable accommodations need to be given to allow Oxford House residents at 2511 Fontaine Road to be up to eight individuals in that home, does not find that evidence to be convincing, and believes that the zoning enforcement officer properly read and construed the ordinance. Ms. Huffman seconded the motion. The Board voted 6-0 in favor of the motion. (Ayes: Pinto, Huffman, Strickland, Turner, Parmele, Brewington. Nays: None.) Mr. Brewington's vote was recorded in the affirmative due to an unexcused absence in accordance with state law.

Chair Pinto gave a recess at 7:12 PM, and the Board reconvened at 7:20 PM.

2) APPEAL OF AN ADMINISTRATION INTERPRETATION

- (a) **BOA-10-12: 4922 MARY STREET** Terry Walsh appeals the zoning interpretation by the office of the Planning Director that the proposed operation of a sexually oriented business located at 4922 Mary Street represents an illegal nonconforming use under the City of Greensboro Development Ordinance. This case was continued from the April 26, 2010 meeting. Section 30-9-6.4(A)(1), Present Zoning – HI, BS-115, Cross Street - Edwardia Drive.

Mr. Clark asked that the Board recognize that these two matters are consolidated into one proceeding due to compliance with state law and the matter of admitting Mr. Murray being admitted *pro hoc vice*. Chair Pinto moved in BOA-10-12 and BOA-10-17, 4922 Mary Street, that those matters be consolidated for one proceeding, and that Mr. Murray's *pro hoc vice* admission be applicable to both matters, seconded by Ms. Huffman. The Board voted 6-0 in favor of the motion. (Ayes: Pinto, Huffman, Strickland, Turner, Parmele, Brewington. Nays: None.) Because Mr. Brewington left the meeting unexcused, his vote was counted in the affirmative.

Rawls Howard stated that Terry Walsh appeals the zoning interpretation by the office of the Planning Director that the proposed operation of a sexually oriented business located at 4922 Mary Street represents an illegal nonconforming use under the City of Greensboro Development Ordinance. The applicant appeals the March 12, 2010, determination and zoning interpretation of the City Planning Director. The property is located on the north side of Mary Street west of South Edwardia Drive on zoning map block sheet 115. Business records indicate that Greensboro Ballroom/Cabaret has been in existence at this location since 1990. The applicant is requesting an interpretation of a letter dated March 12, 2010 concerning the decision of the Planning Director that 4922 Mary Street was never legally established as a sexually oriented business, and is therefore not eligible for nonconforming use status (grandfathering). In 1990, the City zoning map reflects the property was zoned Ind H (Industrial H). The permitted uses in the 1990 permitted use chart did not reflect that sexually oriented businesses were permitted in the Ind H (Industrial H) zoning district. Sec 30-2001: On receiving an application for a use not specifically listed in this section, the enforcement person shall determine if there is a listed use which is similar and shall enforce for the requested use all requirements applicable to the similar use. Based on this 1990 ordinance requirement, it was determined that this property could not have been a legally existing sexually oriented business at such time. When the City did a citywide rezoning, effective July 1, 1992, the property zoning name was changed to HI (Heavy Industrial). The current zoning ordinance permits sexually oriented business uses in the HI (Heavy Industrial) zoning district, if compliance with development standards concerning minimum spacing requirements are met. The HI, Heavy Industrial District is primarily intended to accommodate a wide range of assembling, fabricating, and manufacturing activities. The district is established for the purpose of providing appropriate locations and development regulations for uses which may have significant environmental impacts or require special measures to ensure compatibility with adjoining properties. The existing use is the Greensboro Cabaret, to the north, west, and east is HI, and to the south is LI. Attached in the packet is a map that shows the relative spacing requirements from the subject site to various places of worship, residential uses, and to another sexually oriented business.

Dick Hails read from a letter on March 12th, 2010, to Ms. Walsh, in response to a request for a review of interpretation as to whether sexually oriented businesses are a grandfathered use at 4922 Mary St. The letter stated that the sexually oriented business was never legally established in conformance with existing zoning and development ordinance provisions in place in 1991. Industrial H zoning uses do not include 'live adult entertainment', or any exactly equivalent use category. There is a clear listing entitled 'adult bookstore, adult motion picture theater, adult mini-motion picture' theater in the table of uses. The text preceding this table states that for all uses not specifically listed in the section, the code enforcement officer shall determine if there is a listed use which is similar, and shall enforce for the requested use all requirements applicable to the similar use. Staff found that the category 'adult bookstore...' is similar to the live sexually oriented business use under discussion. The 'adult bookstore...' use was not permitted in Industrial H zoning district. The use also had

spacing requirements of 1,200 feet from other such uses and 500 feet from any residential zoning district. Because the use was not a permitted use in the Industrial H category, the sexually oriented business was never legally established.

Chair Pinto asked if there was anyone present wishing to speak in opposition to the interpretation. The speakers were sworn in.

Richard Shoppe, 426 W. Friendly Ave., attorney representing Terry Walsh, presented exhibits to the Board including affidavits from persons acknowledging that an adult oriented business was in operation at 4922 Mary Street, and a copy of the code that staff believes was in effect in 1990.

Terry Walsh, 4922 Mary St., stated that she owned and operated a dance studio at the address. She stated she teaches dance at the same building, and also rents the building out for various types of events.

Mr. Shoppe stated they were there to challenge an interpretation by the City Planning Director of the zoning ordinance. Ms. Walsh stated that she does rent the building out for sexually oriented business type events. She stated she has been renting the building out for adult use since 1990. She presented a power bill to

Mr. Hails previously to show that the business was open in 1990. The business was rented to promoters that leased the building for adult entertainment. Mr. Shoppe presented copies of Privilege Licenses to the Board. Ms. Walsh stated that the licenses show that the license was changed in 2009 to include the sexually oriented business use. Previous to this change she did not know that it was required. Mr. Shoppe then asked Ms. Walsh to explain the affidavits. Ms. Walsh stated that the affidavits were from patrons who knew adult entertainment was going on at the site. Mr. Shoppe and Ms. Walsh went over the affidavits with the Board.

Chair Pinto stated that staff acknowledges that there was sexually oriented business use at the site in 1990; the issue in this case is that staff found that the use was not legally established or allowed by the zoning at that time.

Mr. Shoppe stated that the issue is whether the Planning Director properly interpreted the zoning ordinance. The disagreement is on the similar use identified by the zoning officer in order to determine zoning regulations. Mr. Shoppe disagrees with the finding that the use as an adult cabaret was most similar to the adult bookstore category. No bookstore of any kind is allowed in that zoning classification, however other things which are similar to an adult cabaret are allowed including: dance halls, assembly halls, side shows, and stage shows. The activity that is going on at the property is not similar to an adult bookstore. Today, no bookstore is allowed in the current HI zoning, but sexually oriented businesses are allowed. He cited page 2040 of the current Zoning Ordinance has very similar language in directing the enforcement officer as to what to do when a specific use is not listed, but also includes that the enforcement officer should rely primarily upon similarity of operational characteristics and similarity of impacts upon adjacent properties. Operationally and impact wise, an adult bookstore and an adult cabaret do not have any similarities. Although adopted in a later ordinance, it shows the intent of the City Council in interpreting uses. In the 1990 ordinance, the City had not considered an adult cabaret. When considered look at the similarity of impact and operational use. Mr. Shoppe stated that the zoning changed to HI in 1992, but Greensboro Cabaret was already established and holding sexually oriented business use events.

Chair Pinto asked when the church and residential uses were established. Mr. Shoppe stated the church use was very recent, and the residential is also fairly recent. The business in question was established before the church, the residential, and Christie's Cabaret, and was therefore not in violation of spacing requirements when established.

Mr. Parmele asked what the nature of the business was listed as in 1990. Ms. Walsh stated that she did not remember exactly, but she was allowed to rent her building. Mr. Parmele stated that his point was he doubted if a business license would have been granted for a sexually oriented business.

Mr. Shoppe stated their argument is the interpretation of the business as similar to an adult book store was incorrect based on the fact that the operational characteristics of the business would be more similar to other categories, such as dance hall. Chair Pinto stated that the operational characteristics are not all that similar

given that dance halls often allow minors and do not sell alcohol, and it seems to him that the operational characteristics are more closely related to adult type businesses, even an adult bookstore.

Mr. Turner asked about the grandfathering of the business for one year. Ms. Walsh stated that the information was reviewed in 2009 and a business license was issued for a sexually oriented business. It was only after the matter was asked to be reviewed again by the proprietors of Christie's Cabaret that Mr. Hails reopened the review and subsequently made the determination that the business was not legally established.

Mr. Hails stated that his letter that talked about an adult bookstore being the closest similar use indicates that the category is actually entitled "Adult Bookstore, Adult Motion Picture Theater, Adult Mini-Motion Picture Theater." He also noted that in the current ordinance and the one in place in 1990, sexually related uses are the most restrictive type of use. For those reasons he did not feel that a dance hall or other non-sexually oriented business fit as well with the type of use. He is not arguing that sexually oriented business went on at the location in 1990, but rather the use was not permitted in that zoning district, so the business was never legally established.

Chair Pinto asked if there was anyone present wishing to speak in favor of the interpretation. The speakers were sworn in.

Michael Murray, 55 Public Square, Cleveland, OH, stated it is important to discuss what is necessary to establish grandfather rights. He does not believe the evidence is sufficient to demonstrate that there had been sexually oriented business continuously over the last twenty years. However, the main issue on which the interpretation was based was the fact that it was never established as a legal use. They agree that the property was never zoned properly for that type of use in that district, but they do disagree with the finding that there was sexually oriented business of any substantial amount since 1990. The ordinance change in 1992 did not allow sexually oriented business in the HI district. It was not allowed in the HI district until 2005. Up until 2005, sexually oriented businesses were not a permitted use in the HI district. Adult bookstores and adult cabarets have been treated the same since as early as 1995, and currently adult bookstores and adult cabarets are permitted in the same zoning districts and have the same separation requirements. Mr. Murray presented a set of exhibits to the Board.

In the 1995 code, under Section 30-5-2.73.5, sexually oriented businesses are allowed in GB, HB, and CB districts, not in HI. The code was amended in 2005 to allow the businesses in HI. The uses of adult bookstore and adult cabaret have always been treated the same.

As far as grandfather rights, the burden of proof is on the appellant. Mr. Murray asked Ms. Walsh a series of questions about her business and operations at 4922 Mary St. In response to those questions Ms. Walsh stated that the business was opened in 1990. The business was for teaching dance and also leasing the building for events. She did not host any sexually oriented events, and was not present for the sexually oriented events. The building was rented out for a variety of reasons including reunions, cabarets, birthday parties, etc. She first rented the building for a sexually oriented event in the fall of 1990. She was not present for the event, and did not see to what level there was nudity at the event. She did not recall the exact hours of the event. She believes she charged the promoter \$750 to lease the building for one night for an adult event. She does not have a copy of the lease at this time, and that is why she presented an affidavit from the promoter. She does not recall how many times she has rented the building to the promoter from 1990 to today. Over this period the adult oriented events were intermittent. She did seek a variance from the Board in 2003 for an awning. Mr. Murray then presented minutes from the 2003 Board of Adjustment meeting. Mr. Murray read a statement from Ms. Walsh's attorney at the hearing, Henry Isaacson, stating that the business was not what is normally know as a gentleman's club or topless type bar, rather dance lessons are taught in the afternoons and planned functions are held there from time to time. Ms. Walsh agreed that was what the minutes showed. Ms. Walsh stated that she did not testify at the Board hearing that there was sexually oriented business events going on at the property, and that her primary business is as a dance teacher. Mr. Murray then cited several annual reports for the state that list her type of business as a dance studio and event hall. Ms. Walsh stated that everything was not explained in the line under type of business because of the various uses that were held at the building.

Mr. Murray also stated that there is a motion to dismiss the appeal because the rules require that the notice of appeal has to be filed within 15 days of the adverse ruling. The adverse ruling was March 12th, 2010, and the notice of appeal was not filed until April 5th, 2010, and is therefore not timely. He also objected to the

introduction of the three affidavits. He does not believe it is competent evidence. The witnesses should have been brought in to allow cross examination. Two of the affidavits were signed today, so they were obviously available.

Michelle Sandrige, 4016 W. Wendover Ave., stated that she has been the manager of Christie's Cabaret since 2002. She stated that she was familiar with the 4922 Mary St. address, she was not familiar with any sexually oriented business events at that address, and she would be aware if they were happening as that is part of her job. She stated that she does not know of any common vendors with the Mary St. address, and she has not heard of any sexually oriented business events at the address by her patrons, employees, or dancers.

John Ligato, 125 S. Main St., Cleveland, OH, stated that he is a retired FBI agent who currently works as a private investigator. He stated that he interviewed several of the people that Ms. Walsh provided statements from. He stated that all of their statements were very general, and they used the same term "adult oriented business." He recorded conversations with Mr. Moula, Mr. Brown, and Ms. Jaimeson. Mr. Ligato stated that he specifically asked Mr. Moula if there was nudity at the events. He stated that Mr. Moula stated that there was no nudity. Mr. Murray then played the recorded phone interview for the Board. Mr. Ligato stated that Ms. Jaimeson stated that she attended one event that may have been adult oriented, a male review show. Mr. Ligato stated that Mr. Cheeks stated there were no events having nudity.

Mr. Murray stated that the burden of proof has not been met that there was consistent use of the property for sexually oriented business. The affidavits are vague and do not mention any events having nudity. Intermittent use is not sufficient. He supports the decision of the Planning Director that the property was never legally established because the use was not allowed in the zoning district, but he disagrees that sexually oriented business events have been going on consistently since 1990 or ever.

Chair Pinto gave those opposed to the interpretation a few minutes of rebuttal.

Mr. Shoppe stated that the ordinance quoted by Mr. Murray was a newer ordinance, and was not in use when the business was established in 1990. Also, in order to maintain a nonconforming use, sexually oriented events only needed to occur once per year. He also objected to the testimony of Ms. Sandrige based on hearsay from her patrons. Ms. Walsh carries the burden of proof on her own to say what goes on at the business. He also objects to testimony of Mr. Ligato, arguing that there may have been some intimidation to the interviewees based on Mr. Ligato's previous work as an FBI agent. He asked that the Board rely on the sworn affidavits.

Ms. Walsh stated that she felt this issue was resolved for a year. The verbiage used was the verbiage given to her by City staff through their interpretation. The dates of changes are based on information by staff. As far as the date of appeal, Mr. Hails' Office sent a letter giving here a timeframe to respond to the decision, and she met that timeframe.

Mr. Parmele asked what prompted Ms. Walsh to inquire about the sexually oriented use. Ms. Walsh stated that she had a promoter that wanted to use the property more frequently for this type of use, and she wanted to ensure that they could.

Ms. Huffman asked if Ms. Walsh could provide any proof of any sexually oriented events over the last twenty years. Ms. Walsh presented a copy of a flyer for one of these events. She estimated that the event was held in the mid-1990s.

Chair Pinto closed the public hearing.

Chair Pinto stated that the interpretation has two conclusions: 1) that the business was in operation as a sexually oriented business since 1990 and 2) the business was not legally established. He asked if the Board should consider 1, 2, or both. Mr. Strickland stated that if the Board found that the business was not legally

established the first conclusion did not matter. Chair Pinto agreed, and continued that the similar use of an adult bookstore is also more similar than the other possible categories.

After some discussion, Chair Pinto moved that in case BOA-10-13, the Board find that the interpretation as set forth by the Planning Director, as outlined in his March 12th, 2010 letter to Richard Green indicating that the sexually oriented business that was, or may have been, run at 4922 Mary Street was never legally established, and is therefore not eligible for legal nonconforming use status, incorporating by reference the findings of fact as outlined by the zoning enforcement officer at the beginning of this hearing, and all of the exhibits that have been introduced at this hearing by both the appellants and the opponents of the interpretation. It is the belief of the Board that in 1990 there was no definition of a sexually oriented business, but in the Industrial H zoning the zoning enforcement officer was instructed to look to the most similar business, and Mr. Hails' interpretation that an adult bookstore, which was not allowed in the zoning district, was in fact the most similar business. This Board finds that was a reasonable and proper conclusion. The Board also finds that the appellants have not come forward with clear and convincing evidence that the interpretation was improper. Therefore this Board affirms the interpretation of Mr. Hails as reflected in his March 12th, 2010, that the sexually oriented business use at 4922 Mary Street was not eligible legal nonconforming use status. Ms. Huffman seconded the motion. The Board voted 6-0 in favor of the motion. (Ayes: Pinto, Huffman, Strickland, Parmele, Turner, Brewington. Nays: None.) Mr. Brewington's vote was recorded in the affirmative due to an unexcused absence in accordance with state law.

NEW BUSINESS

1) VARIANCE

- (a) **BOA-10-17 4922 MARY STREET** Terry Walsh requests a variance from the development standards concerning minimum property separation requirements.

Variance #1: No sexually oriented business is permitted to be located within 1,200 feet of any other sexually oriented business. This property is located 405 feet from an existing sexually oriented business; thus requesting a spacing variance for 795 feet. Section 30-5-2.73.5(B)(1)(2). **(DENIED)**

Variance #2: No sexually oriented business is permitted to locate within 1,000 feet of a church. This property is located 210 feet from a place of worship; thus requesting a spacing variance for 790 feet. Section 30-5-2.73.5(B)(1)(2). **(DENIED)**

Variance #3: No sexually oriented business is permitted to be located within 1,000 feet of a residentially zoned property. This property is located 580 feet from residentially zoned property; thus, requesting a spacing variance for 420 feet. Section 30-5-2.73.5(B)(1)(2). **(DENIED)**

Present Zoning – HI, BS-115, Cross Street – Edwardia Drive.

Rawls Howard stated that Terry Walsh requests a variance from the development standards concerning minimum property separation requirements. *Variance #1*: No sexually oriented business is permitted to locate within 1,200 feet of any other sexually oriented business. This property is located 405 feet from an existing sexually oriented business; thus, the applicant is requesting a spacing variance for 795 feet. *Variance #2*: No sexually oriented business is permitted to locate within 1,000 feet of a church. This property is located 210 feet from a place of worship; thus, the applicant is requesting a spacing variance for 790 feet. *Variance #3*: No sexually oriented business is permitted to be located within 1,000 feet of residentially zoned property. This property is located 580 feet from residentially zoned property; thus, the applicant is requesting a spacing variance for 420 feet. The property is located on the north side of Mary Street west of South Edwardia Drive on zoning map block sheet 115. Business records indicate that Greensboro Ballroom/Cabaret has been in existence at this location since 1990. City records reflect the property has operated as a bar/nightclub since opening in the early 1990's. A bar that is located in the HI (Heavy Industrial) zoning district is not required to meet minimum spacing requirements from residentially zoned property, churches, schools, and public parks.

Bars located in the HI zoning district are permitted by right. (Bars located on tracts less than 5 acres in the GB, HB, CB, and SC zoning districts are required to meet certain spacing requirements). In 1990, the City zoning map reflects the property was zoned Ind H (Industrial H). The permitted uses in the 1990 permitted use chart

did not reflect that sexually oriented businesses were permitted in the Ind H zoning district. When the City did a citywide rezoning, effective July 1, 1992, the property zoning name was changed to HI (Heavy Industrial). The current zoning ordinance permits sexually oriented business uses in the HI zoning district if compliance with development standards concerning minimum spacing requirements are met. **In summary**, based on the HI (Heavy Industrial) zoning district, the location can operate legally as a bar/nightclub, but would have to be granted variances from separation requirements to operate as a sexually oriented business. The HI, Heavy Industrial District is primarily intended to accommodate a wide range of assembling, fabricating, and manufacturing activities. The district is established for the purpose of providing appropriate locations and development regulations for uses which may have significant environmental impacts or require special measures to ensure compatibility with adjoining properties. The existing use is the Greensboro Cabaret, to the north, west, and east is HI, and to the south is LI. Attached in the packet is a map that shows the relative spacing requirements from the subject site to various places of worship, residential uses, and to another sexually oriented business.

Chair Pinto asked if there was anyone present wishing to speak in favor of this matter. The speakers were still under oath.

Richard Shoppe, 426 W. Friendly Ave., stated that Greensboro Cabaret was currently a legal use under the HI zoning. It does not meet spacing requirements as set out in the ordinance. However, the business has been in operation as a sexually oriented business since 1990. As far as the setbacks are concerned, the property is not nearly as close to the residential district as is Christie's Cabaret, only a few feet nearer to the church, the same distance to Christie's Cabaret as Christie's Cabaret is to it, and it was an established use before Christie's Cabaret. The argument is based on fairness in this situation. Ms. Walsh only wants to do is continue what she always done at this location. She can make some use of the building, but the variance will limit when and how she wants to use the business. She will not be able to make the reasonable use to lease it out for sexually oriented business. The hardship she faces is that she will not be able to continue the business as she has since the business opened in 1990. The variance is significant, but the impact and overall effect on the neighborhood is very minimal. The hardship is not the result of Ms. Walsh's own actions, but because of the new competition and changes in zoning. There is no harm to the public safety or neighborhood to granting this variance, except as a competitor to Christie's Cabaret. He asked for the variance for this business to carry on as it has in the past.

Chair Pinto stated that the argument that no reasonable use can be made is hard to agree with given that the business has been in operation since 1990 with many other uses than sexually oriented. He asked Mr. Shoppe to explain how no reasonable use could be made but for the granting of the ordinance. Mr. Shoppe stated that it comes down to what the Board believes is a reasonable use, and he asked that they consider that the particular use she has made in the past will no longer be available to her.

Chair Pinto asked if there was anyone wishing to speak in opposition to the variance. The speakers were still under oath.

Michael Murray, 56 Public Square, Cleveland, OH, asked Ms. Walsh a series of questions pertaining to the case. In response to the questions from Mr. Murray, Ms. Walsh stated that she did intend to allow the third party lessee to operate a topless bar during the approximate hours of late afternoon until early morning about five days a week. Mr. Murray stated that the changes will be significant based on those answers. The establishment will become a relatively permanent adult topless night club. The variance standards are difficult to overcome. A reasonable use of the property can be made and there are no unique circumstance related to the property that would validate a variance.

Chair Pinto closed the public hearing.

The Board discussed the fact that some would like to find a means to allow Ms. Walsh to continue her business, but the standards needed to grant a variance have not been met. The Board was curious as to how the operation of this business was not known by the City. The church related to the matter was established

within the last two years, and the residential district was rezoned within the last 4 years. There is no direct connection between Mary St. and the residential neighborhood. The Board recognized the applicant's argument that this is a matter of fairness, and continued operation was not likely to have any more impact on the neighborhood than the operations of Christie's.

After some discussion Chair Pinto moved that in BOA-10-17 Variance #1 based on the stated findings of fact, and incorporating the findings of fact by the zoning enforcement officer, as well as the exhibits introduced, that the zoning enforcement officer be upheld and the variance denied. The Board finds as a fact that reasonable use can be made of the property because the property owner has been in operation at the location for 20 years as a dance studio and event center, and sexually oriented business has been a part of the business, but a reasonable small and sporadic part to the business over the years. Further, the variance requested is not minimal in nature, and there are not unique circumstances related to the property in question. Further, the general purpose of the ordinance for Variance #1 is to keep separation between sexually oriented businesses, for Variance #2 to keep separation between sexually oriented businesses and places of worship, for Variance #3 to keep separation between sexually oriented businesses and residential areas, and the variance would not be in harmony with those general purposes. There has been no evidence before the Board that either the granting of the variance or denial of the variance would have any effect on public safety. The Board determines that if the applicant complies with the provisions of this ordinance she can make reasonable use of the property. The hardship of which the applicant complains does not result from the unique circumstances of the property. The hardship does not result from the application of this ordinance to the property. The hardship is the result of the applicant's own actions. The variance is not in harmony with the general purpose and intent of the ordinance. The granting of the ordinance does not assure public safety and welfare, and does not do substantial justice. Ms. Huffman seconded the motion. The Board voted 5-1 in favor of the motion. (Ayes: Pinto, Huffman, Strickland, Parmele, Brewington. Nays: Turner.) Mr. Brewington's vote was recorded in the affirmative due to an unexcused absence in accordance with state law.

With regard to BOA-10-17, Variance #2, Chair Pinto incorporated by reference the entire motion for Variance #1, and moved to uphold the decision of the zoning enforcement officer and deny the variance, seconded by Ms. Huffman. The Board voted 5-1 in favor of the motion. (Ayes: Pinto, Huffman, Strickland, Parmele, Brewington. Nays: Turner.) Mr. Brewington's vote was recorded in the affirmative due to an unexcused absence in accordance with state law.

With regard to BOA-10-17, Variance #3, Chair Pinto incorporated by reference the entire motion for Variance #1, and moved to uphold the decision of the zoning enforcement officer and deny the variance, seconded by Ms. Huffman. The Board voted 5-1 in favor of the motion. (Ayes: Pinto, Huffman, Strickland, Parmele, Brewington. Nays: Turner.) Mr. Brewington's vote was recorded in the affirmative due to an unexcused absence in accordance with state law.

OTHER BUSINESS:

Mr. Howard stated that the new LDO has been adopted and will be effective July 1st. The Board will likely see some changes that will be outlined later.

ADJOURN:

There being no further business before the Board, the meeting adjourned at 10:31 PM.

Respectfully submitted,

Rick Pinto, Chair
Greensboro Board of Adjustment

RP/jd